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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO SILLAS,

Defendant and Appellant.

2d Crim. No. B231307
(Super. Ct. No. 2010011088)
(Ventura County)

Gerardo Sillas appeals the judgment entered after he pled guilty to carjacking (Pen. Code,¹ § 215, subd. (a)), robbery (§ 211), and possession of a firearm by a felon (former § 12021, subd. (a)(1)).² Appellant also admitted that he personally used a firearm in committing the carjacking and robbery (§§ 12022.5, subd. (a), 12022.53, subd. (b)), and had suffered four prior strike convictions (§§ 667, subds. (c)-(e), 1170.12, subds. (a)-(c)). The trial court sentenced him to a total term of 17 years four months in state prison. Appellant contends that he was erroneously deprived of his personal right to move to withdraw his plea with the assistance of counsel. We affirm.

¹ All further undesignated statutory references are to the Penal Code.

² Former section 12021 was repealed and reenacted as section 29800, effective January 1, 2011, operative January 1, 2012.

FACTS AND PROCEDURAL HISTORY

The Offenses

At about 5:50 a.m. on March 28, 2010, John Beaudion was driving when he came upon two trash containers and tree branches that were blocking the road. When Beaudion got out of his vehicle, a Hispanic man jumped out from behind bushes and pointed a handgun at him. The man, who had a shaved head and was wearing a blue jacket, ordered Beaudion to give him his wallet and get down on the ground. After Beaudion told the man that his wallet was in the car, the man "racked a round" in the gun and told Beaudion, "If I ever see you again, I'm going to kill you." The man told Beaudion to run. As Beaudion did so, the man got into Beaudion's car and drove away.

Beaudion's vehicle was found later that morning in a field about one-quarter of a mile east of where it had been taken. Appellant, who had a shaved head and was wearing a blue jacket, was detained approximately one and a half miles east of the crime scene. Beaudion's wallet, driver's license, and bank card were found in appellant's pocket, and a semiautomatic handgun was recovered from his waistband.

That same morning, Leonides Montes was cutting weeds on the side of the road when a man approached him and said he had just assaulted someone and stolen his wallet. The man, who had a shaved head and was wearing a blue jacket, also said he had shot a dog that was attacking him, and displayed a handgun that was tucked in his waistband. Arthur Garnica, who lived approximately 50 yards from where Beaudion's car was found, reported that his dog had been shot that morning. When appellant was arrested, he complained that he had been bitten by a dog.

Appellant's Guilty Plea

Appellant was charged with carjacking, robbery, possession of a firearm by a felon, assault with a semiautomatic firearm (§ 245, subd. (b)), unlawful firearm activity (former § 12021, subd. (e)), possession of ammunition (former § 12316, subd. (b)(1)),³ and drawing or exhibiting a firearm (§ 417, subd. (a)(2)). It was further alleged that

³ Effective January 1, 2012, former Penal Code section 12316 was repealed and reenacted without substantive changes as section 30305.

appellant had personally used a firearm in committing the carjacking, robbery, and assault; and had four prior strike convictions. Pursuant to a negotiated disposition, appellant pled guilty to the first three charges and admitted the sentence enhancement allegations. During the plea colloquy, appellant stated that his guilty plea was freely and voluntarily made and was not the result of force, pressure, threat, or coercion. He initialed a paragraph to the same effect in the felony disposition statement, and also initialed paragraphs stating that his attorney had explained the direct and indirect consequences of the plea, which included a maximum possible sentence of 38 years four months to life in state prison. The court found that appellant had entered his plea knowingly, voluntarily and intelligently and understood the nature of the charges and the consequences of his pleas and admissions. The court accordingly accepted the plea and set the matter for sentencing.

Appellant's Marsden⁴ Motion and Subsequent Sentencing

At the outset of the sentencing hearing, appellant's attorney told the court that appellant "would like to attempt to withdraw his plea per *Marsden*." The court asked appellant if he "underst[ood] what a *Marsden* motion means," and appellant applied in the affirmative. The court thereafter cleared the courtroom and conducted a closed hearing. During that hearing, appellant claimed that counsel had failed to subpoena potential witnesses and stated, "I don't think the investigation . . . was adequate for my defense." He also complained that counsel had not filed several pretrial motions that appellant had asked him to file, including one "to strike evidence[.]" Appellant offered that he had decided to plead guilty "because I got my public defender next to me telling me we're gonna lose. . . . So actually it's a little bit intimidation, you know, threatened — maybe not threatening, but he's basically telling me there's no hope, you know. I think with a competent attorney there would have been a little bit better of an outcome."

Counsel replied that he had not filed appellant's proffered motions, including one to strike gang allegations, because they "had no application to the present

⁴ (*People v. Marsden* (1970) 2 Cal.3d 118.)

facts for my client's case." Counsel also offered that "[t]here were no witnesses for us to subpoena other than potentially [for] other issues such as character, which we don't want to bring in, because my client's history is such that I wasn't trying to open this case up to character evidence." Counsel noted that appellant was facing a potential life sentence and explained: "The only defense we were both in agreement on and the defense was going to be that there was [sic] lost items found in a jacket." Counsel added that "we almost went to trial. We were this close. And as the jury was coming up, he changed his mind."

The court noted that appellant's attorney had filed successful motions to exclude evidence and concluded that the motions appellant wanted counsel to file would have been futile. The court accordingly denied appellant's *Marsden* motion and proceeded to sentence him. Appellant filed a timely notice of appeal and obtained a certificate of probable cause challenging the denial of his motion for substitute counsel.

DISCUSSION

Appellant contends that he "was deprived of his personal right to move to withdraw his guilty plea with assistance of counsel." He argues that his trial attorney "awkwardly" labeled his request to withdraw his plea as a *Marsden* motion, and claims that "the issue of whether appellant should be allowed to withdraw his plea was never addressed by either defense counsel or the court." According to appellant, he "was entitled to a hearing on his motion at which counsel presented his grounds for withdrawing the plea, even if counsel felt it was not in the client's best interest to do so."

We conclude that the requested relief was both properly framed by trial counsel and sufficiently adjudicated by the court. Although a criminal defendant controls the right to move to withdraw his or her plea (*People v. Brown* (1986) 179 Cal.App.3d 207, 215 (*Brown I*)), trial counsel is not obligated to file a meritless motion (*People v. Brown* (2009) 175 Cal.App.4th 1469, 1472-1473 (*Brown II*)). Where, as here, counsel declines to file the motion, the proper procedure is for the defendant to seek new counsel under *Marsden*. If the court concludes that counsel properly declined to file the motion,

the *Marsden* request should be denied. (*Brown II*, at pp. 1472-1473.) We review the trial court's ruling for an abuse of discretion. (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

The court did not abuse its discretion in denying appellant's *Marsden* motion. Contrary to appellant's claim, it was clear that the purpose of the proceeding was to determine whether he was entitled to have substitute counsel appointed to file a motion to withdraw his plea. The record also states appellant's reasons for seeking to withdraw his plea. Appellant told the court that he had decided to plead guilty at the last minute because counsel kept telling him they were going to lose at trial and appellant believed that "with a competent attorney there would have been a little bit better of an outcome." To the extent this can be construed as a claim that appellant's plea had been induced by constitutionally ineffective assistance of counsel, appellant did not make the showing necessary to compel the appointment of substitute counsel on that ground. "The court fully allowed defendant to state his complaints, then carefully inquired into them. Defense counsel responded point by point." (*People v. Smith, supra*, 6 Cal.4th at p. 696.) Appellant failed to identify any instance in which counsel's performance might be construed as constitutionally inadequate, nor did he indicate that an irreconcilable conflict had arisen such that new counsel was warranted. (*Id.* at pp. 696-697.)

To the extent appellant merely believed that a "better" attorney stood a greater chance of prevailing at trial, nothing about that a belief would undermine the court's decision to accept appellant's plea as knowing, voluntary, and intelligent when it was made. Moreover, counsel's refusal to file a motion to withdraw appellant's plea reflects a conclusion that such a motion would be futile. Under the circumstances, it cannot be said that the court abused its discretion in denying the *Marsden* request.

Appellant's reliance on *Brown I* is unavailing. In that case, trial counsel advised the trial court that he had refused the defendant's request to move to withdraw his plea. The trial court allowed the defendant to explain why he wanted to withdraw his plea, then denied his request to have new counsel appointed to represent him. (*Brown I, supra*, 179 Cal.App.3d at pp. 211-213.) In reversing and remanding, the Court of Appeal concluded the defendant was "deprived of his right to make an effective motion to

withdraw his plea" because when he moved to do so he was represented by counsel, and the defendant could not make the motion on his own behalf. (*Id.* at p. 213.) The matter was remanded for the trial court to determine whether trial counsel continued to refuse to make a motion to withdraw the plea and, if so, to hold a *Marsden* hearing to determine if the defendant was entitled to new counsel. (*Id.* at p. 216.) Here, such a hearing was held.

Appellant's reliance on *People v. Osorio* (1987) 194 Cal.App.3d 183, disapproved on other grounds in *People v. Johnson* (2009) 47 Cal.4th 668, 681, is similarly misplaced. In that case, trial counsel acknowledged that grounds existed for the defendant to withdraw his plea, yet, refused to bring the motion because he believed it was not in the defendant's best interests. (*Osorio*, at pp. 185-186.) The Court of Appeal reversed on the ground that counsel could not refuse to file a meritorious motion to withdraw his client's plea. (*Id.* at p. 189.) Here, trial counsel did not state that he was refusing to file a motion he believed would have merit. Moreover, in denying the *Marsden* motion the court found that appellant had failed to identify any potentially meritorious ground that would entitle him to withdraw his plea. As we have explained, the court did not abuse its discretion in making that finding.

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

David Long, Judge
Superior Court County of Ventura

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